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October 5, 1998

THOMAS J. HUTTON
202-828-1892

VIA HAND DELIVERY

Magalie Roman Salas, Esquire
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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OCT - 5 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: In the Matter of
Amendment of Section 73.202(b),
Table of Allotments, FM Broadcast Stations.
(Douglas, Wyoming)
MM Docket No. 98-151; RM-9320

Dear Ms. Salas:

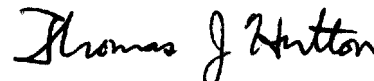
Transmitted herewith, on behalf of Mount Rushmore Broadcasting, Inc., is an original and four (4) copies of its Comments and Counterproposal in the above-captioned rule making proceeding.

An extra copy of the filing is enclosed. Please date-stamp the extra copy and return it to the courier for return to me.

If you have any questions, please contact the undersigned.

Very truly yours,

HOLLAND & KNIGHT LLP



Thomas J. Hutton
Counsel for
Mount Rushmore Broadcasting, Inc.

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Enclosure

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BEFORE THE
Federal Communications Commission
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OCT - 5 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations.)
(Douglas, Wyoming))

MM Docket No. 98-151
RM-9320

To: Chief, Allocations Branch

COMMENTS AND COUNTERPROPOSAL

I. INTRODUCTION.

1. Mount Rushmore Broadcasting, Inc. ("Mount Rushmore"), by its attorneys, files its Comments and Counterproposal with respect to the Notice of Proposed Rule Making ("NPRM") released by the Allocations Branch on August 14, 1998 (DA 98-1551). The NPRM, issued at the request of Mountain Tower Broadcasting ("Mountain Tower"), proposes to allot Channel 223C1 to Douglas, Wyoming.

2. Mount Rushmore respectfully urges the Commission to reexamine its FM allocation policy, so as to better serve the public interest. In conjunction with the Commission's pending rule making on auction procedures for mutually exclusive commercial broadcast license applications (*Notice of Proposed Rule Making*, MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264 (rel. Nov. 26, 1997)) and with its notice of inquiry on the broadcast ownership rules (*Notice of Inquiry*, MM Docket No. 98-35 (rel. Mar. 13, 1998)), the Commission should institute a notice of inquiry to determine (1) whether the current FM allocation policy continues to meet the Commission's obligation under Section 307(b) of the Communications Act of 1934 (the "Act"), as amended, and (2) whether the policy has been detrimental to the

enhancement of minority ownership of FM broadcast stations. In the meantime, the Commission should cease application of its FM allocation policy.

3. Alternatively, if the Commission nonetheless decides to apply its current FM allocation policy here, then Mount Rushmore proposes to allot Channel 222A to Guernsey, Wyoming and Channel 223A to Douglas, Wyoming.

II. THE COMMISSION SHOULD INSTITUTE A NOTICE OF INQUIRY TO EVALUATE WHETHER THE CURRENT FM ALLOCATION POLICY CONTINUES TO MEET THE COMMISSION'S OBLIGATION UNDER SECTION 307(b) OF THE ACT AND WHETHER THE POLICY HAS BEEN DETRIMENTAL TO THE ENHANCEMENT OF MINORITY OWNERSHIP OF FM BROADCAST STATIONS.

4. The FM Table of Assignments ("FM Table") is intended to allow the Commission to meet its obligation under Section 307(b) of the Act to provide a "fair, efficient and equitable distribution of radio service" to the various states and the communities within them. The Commission has stated that the objectives to be served by the FM Table are:

- * Provision of some service of satisfactory signal strength to all of the country;
- * Provision of as many program choices to as many listeners as possible; and
- * Service of local origin to as many communities as possible.

Second Report and Order, 90 F.C.C. 2d 88, 89 (1982).

5. In its *Second Report and Order*, in response to the growing demand for FM channels, the Commission reevaluated its original FM priorities (adopted in 1961) and adopted new, updated FM priorities to evaluate conflicting allocation proposals. The priorities are:

- "(1) First full-time aural service.
- (2) Second full-time aural service.

- (3) First local service.
- (4) Other public interest matters.

[Co-equal weight would be given to priorities (2) and (3)]."

Second Report and Order, 90 F.C.C. 2d at 91. Under FM priority 4, the Commission considers factors such as population served and the availability of other services. See *Eatonton and Sandy Springs, Georgia, et al.*, 6 FCC Rcd 6580, 6585 (MMB 1991), *aff'd*, 12 FCC Rcd 8392 (Policy & Rules Div. 1997), *app. for review dismissed*, 13 FCC Rcd 2104 (Policy & Rules Div. 1998).

6. Mount Rushmore urges the Commission to again reevaluate and update its FM priorities. In the current environment of high demand for and low supply of FM channels everywhere, the existing FM allocation policy no longer meets the Commission's obligation under Section 307(b), nor serves the objectives of the FM Table. In particular, the Commission's application of the current FM priorities to conflicting allocation proposals have resulted in inadequate attention to local service and the needs of smaller, rural communities.

7. Indeed, in cases involving conflicting proposals, the existing FM priorities favor large, urban areas over smaller, rural communities. For example, under the Commission's current FM allocation policy, in cases involving a choice between second aural and first local services or between two first local services, preference would be given to the larger, more populous community, leaving the smaller communities underserved. See *Second Report and Order*, 90 F.C.C. 2d at ¶ 11; *St. Marks and Woodville, Florida*, 12 FCC Rcd 11,957 (Alloc. Branch 1997).

8. The institution of auctions for contested FM cases is another recent development that makes it appropriate to reexamine the Commission's FM allocation policy. Now that the auction process will be used to select the party that will use a particular channel, it is more

important than ever to make sure that channels are allocated to the appropriate communities. The Commission's system of adding channels through petitions by parties such as Mountain Tower should be suspended and reexamined in light of current conditions, including the new auction procedure. Accordingly, the Commission should institute a notice of inquiry to determine whether its current FM allocation policy meets the Commission's obligation under Section 307(b) of the Act.

9. In addition, the Commission's existing FM allocation policy may be detrimental to the enhancement of minority ownership of FM broadcast stations because the current policy favors incumbent station owners that have the knowledge, resources and financial means to institute a petition for rule making to amend the FM Table, to apply for a construction permit, and then to participate in an auction for the new FM station.

10. In his speech to the NAB Convention in April 1998, Chairman Kennard reported that he was "dismayed to see that minority broadcast ownership was a mere 3.1% in 1996. This year that's dropped to 2.8%." With respect to radio stations, in particular, the number of minority-owned commercial radio stations declined from 312 in 1995 to 284 in 1996/97. *See* Minority Commercial Broadcast Ownership in the U.S., a report of the Minority Telecommunications Development Program, National Telecommunications and Information Administration (Aug. 1997).

11. The Commission has a statutory obligation under Section 309(j) of the Act as well as an historic commitment to encourage minority participation in the telecommunications industry. Indeed, in his recent speech at the NAB Convention, Chairman Kennard issued a challenge to the

broadcast industry to “develop ideas to promote opportunity for ownership by minorities and women within the broadcast industry.”

12 Accordingly, Mount Rushmore proposes that the Commission institute a notice of inquiry to determine whether its current FM allocation policy has been detrimental to the enhancement of minority ownership of FM stations and to explore ways to foster opportunities in broadcast ownership for minorities and women. The Commission has an obligation to act now and, in the interim, to cease application of its current FM allocation policy.

III. CHANNEL 222A, GUERNSEY, WYOMING AND CHANNEL 223A, DOUGLAS, WYOMING IS THE PREFERRED ALLOCATION.

13. In the event the Commission decides to proceed with this particular rule making, Mount Rushmore proposes the allotment of Channel 222A to Guernsey, Wyoming and Channel 223A to Douglas, Wyoming, which will provide a first local service to Guernsey and a second FM service to Douglas. Mount Rushmore’s proposal is the preferred allocation because it would provide new or additional service to two communities, whereas Mountain Tower’s proposed allotment of Channel 223C1 to Douglas, Wyoming would provide a second FM service to only one community. As demonstrated in the Engineering Statement attached hereto as Exhibit E, Channel 222A may be assigned to Guernsey, Wyoming and Channel 223A to Douglas, Wyoming in full compliance with Section 73.202(b) of the Commission’s Rules. If Mount Rushmore’s proposal is adopted, Mount Rushmore will apply for construction permits for Channel 222A in Guernsey and Channel 223A in Douglas.

14. Guernsey is a U.S. Census designated community with a population of 1,155.¹ The community of Guernsey has its own post office and zip code, and is governed by a mayor and a town council. Guernsey also has a police department, a volunteer fire department, a school, a library, 4 churches, several restaurants, and a number of other businesses usual to a community of its size. This underserved community has a need for a daily resource for information on current civic, cultural and school issues and events that could be provided by a local radio station. In addition, the allotment of an FM channel at Guernsey would provide the community with much needed emergency information during severe weather.

15. Douglas is an incorporated community and is credited by the U.S. Census with a population of 5,076. Douglas is governed by an elected mayor and town council, and has its own town hall, Chamber of Commerce, post office, and zip code. The community of Douglas also has its own police department and fire department as well as 7 churches, 1 K-12 school, a community college, 5 motels/hotels, 10 restaurants, several social and civic organizations, and approximately 30 other businesses. Douglas is an underserved community that is deserving of an additional outlet for local self-expression.

16. Where, as here, the first two FM priorities are not implicated, the Commission must be guided by FM priorities 3 and 4. As proposed by Mount Rushmore, the allotment of Channel 222A to Guernsey, Wyoming would provide a first local service to Guernsey and the allotment of Channel 223A to Douglas, Wyoming would provide a third aural service and second FM service to Douglas. Mountain Tower's proposal to allot Channel 223C1 to

¹ Hereinafter, all population data are based on the 1990 U.S. Census.

Douglas, Wyoming would provide a second FM service to that community. Mount Rushmore's proposal is the preferred allotment because it fulfills a higher FM priority than does Mountain States' proposal. Mount Rushmore's proposed allotment fulfills FM priority 3 by providing Guernsey with a first local service. In contrast, Mountain Tower's proposal fulfills only FM priority 4 by providing Douglas with a third aural service and second FM service, which Mount Rushmore's proposal also provides. Further, the combined populations of Guernsey and Douglas (6,231) is greater than the population of Douglas alone (5,076). Mount Rushmore's proposal, therefore, would result in more efficient use of the channels. Accordingly, the public interest favors the grant of Mount Rushmore's proposal which would provide new or additional service to the most people.

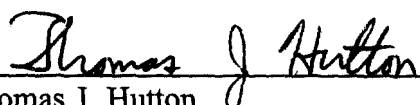
IV. CONCLUSION.

For the reasons stated above, Mount Rushmore respectfully requests that the Commission institute a notice of inquiry to determine (1) whether the current FM allocation policy continues to meet the Commission's obligation under Section 307(b) of the Act, and (2) whether the policy has been detrimental to the enhancement of minority ownership of FM broadcast stations. In the meantime, the Commission should cease application of its FM allocation policy. If, however, the Commission nonetheless decides to apply its current FM allocation policy here, then Mount

Rushmore respectfully requests that the Commission adopt its Counterproposal and allot Channel 222A to Guernsey, Wyoming and Channel 223A to Douglas, Wyoming.

Respectfully submitted,

Mount Rushmore Broadcasting, Inc.



Thomas J. Hutton
Patricia Y. Lee

Its Attorneys

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Suite 400
Washington, D.C. 20037
(202) 955-3000

October 5, 1998

WAS1-385095

CERTIFICATE OF SERVICE

I, Ellen Dorsey, an employee of Holland & Knight LLP, hereby certify that on October 5, 1998, a copy of the foregoing Comments and Counterproposal of Mount Rushmore Broadcasting, Inc. was served by first class U.S. Mail, postage prepaid, to the following:

Victor A. Michael, Jr.
President
Mountain Tower Broadcasting
7901 Stoneridge Drive
Cheyenne, Wyoming 82009



Ellen Dorsey

EXHIBIT E
ENGINEERING STATEMENT RE:
MODIFICATION OF THE FM TABLE OF ALLOTMENTS
MM DOCKET NO. 98-151
MT. RUSHMORE BROADCASTING, INC.
DOUGLAS, WYOMING

INTRODUCTION

This statement was prepared on behalf of Mt. Rushmore Broadcasting, Inc. ("Mt. Rushmore"). It is presented in support of a counterproposal to the proposed modification of Section 73.202(b) of the Rules of the Federal Communications Commission (FCC Rules) in the above referenced Docket.

COUNTERPROPOSAL AND ALLOCATION STUDY

The following additions to the FCC Table of Allotments, Section 73.202(b) are proposed:

| | | |
|--------------|----|-------------------|
| Channel 223A | -- | Douglas, Wyoming |
| Channel 222A | -- | Guernsey, Wyoming |

An allocation separation study has been conducted for each of the above allotments. Attached as Figures 1 and 2 are the study results for the two communities respectively. The proposed allotments were all found to comply with the minimum distance separations specified in Section 73.207 of the FCC Rules from the assumed allocation coordinates specified for each community. The assumed allotment sites meet the requirements of Section 73.315(a) of the FCC Rules.

Respectfully submitted,
Lohnes and Culver

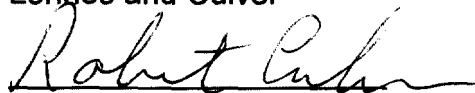

by Robert D. Culver, P.E.

FIGURE 1
FM ALLOCATION STUDY
RE: PROPOSED ADDITION OF
CHANNEL 223A TO DOUGLAS, WYOMING

| <u>CHANNEL</u> | <u>STATION</u> | | <u>CITY, STATE</u> | <u>DISTANCE SEPARATION IN KM</u> | |
|----------------|---|--------------|--------------------|----------------------------------|--------------------------------|
| | <u>CALL</u> | <u>CLASS</u> | | <u>ACTUAL</u> ⁽¹⁾ | <u>REQUIRED</u> ⁽²⁾ |
| 220 | No stations within required separation plus 50 kilometers | | | | |
| 221 | No stations within required separation plus 50 kilometers | | | | |
| 222 | PADD | C1 | Kaycee, WY. | 146 | 133 |
| | NEW | C | Rapid City, SD. | 215 | 165 ⁽⁴⁾ |
| 223 | PADD | C1 | Douglas, WY. | 31.7 | 200 ⁽³⁾ |
| 223 | KVOD(FM) | C1 | Greeley, CO. | 302 | 200 |
| 224 | VACA | A | Centennial, WY. | 169 | 72 |
| 224 | KIQZ(FM) | A | Rawlins, WY. | 186 | 72 |
| 225 | No stations within required separation plus 50 kilometers | | | | |
| 226 | No stations within required separation plus 50 kilometers | | | | |
| 276 | No stations within required separation plus 50 kilometers | | | | |
| 277 | No stations within required separation plus 50 kilometers | | | | |

Assumed Allotment site coordinates: 42° 46' 54" 105° 26' 30"

- Notes:
- (1) Calculated distance separation between stations in accordance with Section 73.208 of the FCC Rules.
 - (2) Required minimum distance separation between stations per Section 73.207 of the FCC Rules.
 - (3) Mutually exclusive pending Allocation D98-151.
 - (4) Closest of several applications.

FIGURE 2
FM ALLOCATION STUDY
RE: PROPOSED ADDITION OF
CHANNEL 222A TO GUERNSEY, WYOMING

| <u>CHANNEL</u> | <u>STATION</u> | | <u>CITY, STATE</u> | <u>DISTANCE SEPARATION IN KM</u> | |
|----------------|---|--------------|--------------------|----------------------------------|--------------------------------|
| | <u>CALL</u> | <u>CLASS</u> | | <u>ACTUAL</u> ⁽¹⁾ | <u>REQUIRED</u> ⁽²⁾ |
| 219 | No stations within required separation plus 50 kilometers | | | | |
| 220 | KUWR(FM) | C | Laramie, WY. | 120 | 95 |
| 221 | No stations within required separation plus 50 kilometers | | | | |
| 222 | PADD | C1 | Kaycee, WY. | 218 | 200 |
| | NEW | C | Rapid City, SD. | 215 | 165 ⁽⁴⁾ |
| 223 | PADD | C1 | Douglas, WY. | 47.0 | 133 ⁽³⁾ |
| 223 | KVOD(FM) | C1 | Greeley, CO. | 244 | 133 |
| 224 | VACA | A | Centenial, WY. | 145 | 31 |
| 225 | KMOR(FM) | C | Scottsbluff, NE. | 97.6 | 95 |
| 275 | No stations within required separation plus 50 kilometers | | | | |
| 276 | No stations within required separation plus 50 kilometers | | | | |

Assumed Allotment site coordinates: 42° 17' 24" 104° 50' 24"

- Notes:**
- (1) Calculated distance separation between stations in accordance with Section 73.208 of the FCC Rules.
 - (2) Required minimum distance separation between stations per Section 73.207 of the FCC Rules.
 - (3) Mutually exclusive pending Allocation D98-151.
 - (4) Closest of several applications.